



EMPLOYMENT TRIBUNALS

Claimant: Mr N Benson

Respondents: Kiss Graphics Limited (1)
Mr J Sunderland (2)
Mrs C Sunderland (3)

Heard at: Leeds **On:** 4 December 2018

Before:

Employment Judge JM Wade
Ms NH Downey
Mr M Elwen

Representation

Claimant: Miss J Hill (solicitor)
First respondent: No participation
Second and Third Respondents: Mr J Buckle (consultant)

JUDGMENT

- 1 On 8 November 2018 the claimant was not a disabled person within the Equality Act 2010. His complaints of disability discrimination against the respondents are therefore dismissed.
- 2 The first respondent shall pay to the claimant the sum of £20,765.16, which is the maximum Compensatory Award in these circumstances.
- 3 The first respondent shall further pay to the Secretary of State the maximum financial penalty of £5000 pursuant to section 12A of the Employment Tribunals Act 1996 because the Tribunal is satisfied that there were aggravating features to the breach of his statutory right not to be unfairly dismissed.

REASONS FOR REMEDY JUDGMENT

- 1 The claimant commenced ACAS conciliation naming the first respondent in these proceedings on 4 January 2018 in respect of a dismissal on 8 November 2017 and other matters. He had been employed by this company since May 2012

but had worked with predecessor businesses for more than twenty years. The claim was presented in time on 2 March 2018.

2 Mr Sunderland is the first respondent's director and owner. The response was due by 5 April 2018. On 11 April 2018 a new company was incorporated at the same registered office as the first respondent, with Mr Sunderland as the sole director. Its name was Kiss Graphics Leeds Ltd. Around the end of April there was a charge satisfied, and a new charge registered and satisfied concerning the first respondent.

3 A response was not presented on behalf of the first respondent. Mr Sunderland attended a case management hearing on 26 April 2018 and an extension of time was granted, to 24 May 2018. It was apparent then that the complaint of unfair dismissal may not be defended. The response then entered did not accept liability. At a subsequent hearing on 31 May 2018 before Employment Judge Lancaster it was recorded that the claimant was summarily dismissed on 8 November. This had happened after around 15 weeks' absence for stress at work. It was recorded that the circumstances were such that there "this will almost certainly be a procedurally unfair dismissal". There were also disability discrimination complaints and money related claims to decide, including a failure to pay wages, sick pay and holiday pay.

4 On 10 November 2018, after his dismissal, it was recorded in the claimant's GP notes that "was dismissed from work because of whistleblowing – had to inform HMRC reg. tax issues at work". Earlier notes recorded that the claimant had found out before 2 September 2017 that he had not been paid since June 2017 and that "boss hasn't paid PAYE or ni for 4 years". The notes further recorded: "needs to decide if cut losses and go to new job or pursue past job and get into complex situation..aware may have then lost 4 years' of NI and PAYE, concerned effects pension".

5 The respondent was subject to an unless order for failing to comply with Orders, on 12 September 2018, when "it appears that the respondent is not actively pursuing its defence as it is due to go into creditors voluntary liquidation". On 12 September a resolution to wind up the first respondent was presented; on 18 September a charge was registered against Kiss Graphics Leeds Ltd.

6 On 26 September 2018 a hearing took place at which permission was granted to name the second and third respondents as respondents to the disability discrimination complaints; Mr Sunderland represented the first respondent and Judgment was entered for the money claims and it was declared that the claimant had been unfairly dismissed.

7 The same day a liquidator was appointed for the first respondent. On 28 September 2018 its registered office address was changed to a Manchester corporate recovery firm. The claimant is seeking payment of the statutory sums from the Redundancy Payments Office. Representatives then came on the record for Mr and Mrs Sunderland (but not for the first respondent).

8 This hearing was arranged to decide whether the claimant met the Equality Act definition of disability; to decide his disability discrimination complaints if required and to address the compensatory award for unfair dismissal.

9 After we had given Judgment in the disability discrimination complaints (which were dismissed because the claimant did not meet the Equality Act 2010 definition of a disabled person at 8 November 2018), Mr Buckle confirmed that as he did not represent the first respondent, and his clients had not wish to stay, could they be released. The Tribunal informed him that it was a matter for the Sunderlands as to whether they remained for the determination of unfair dismissal remedy or not. They did not remain.

10 Until late October 2017 when the claimant, with the assistance of a mental health support worker, submitted requests for pay slips and non payment of PAYE and NI to be addressed, the parties were in constructive discussions about a return to work with the assistance of the claimant's support worker. After that, the second and third respondents wrote on 8 November, saying [sic]: "On reflection of statements and my clients request we are dismissing Nigel Bensons employment From Kiss Graphics Ltd. We wish to back date the dismissal date from 14th of July as this was his last day in attendance. Nigel has been gathering information on the old premises, stated to other work colleagues he had no intention to move to Rothwell, ignored requests to attend back to work meetings and working under the influence of alcohol. For these reasons my client feels Nigel never intended to return to work for Kiss Graphics."

11 We consider these latter matters inherently unlikely having heard from the claimant today: they are nonsense and seeking to divert attention from the respondent's failure to pay national insurance and PAYE for the claimant for some years. The circumstances of his dismissal, and seeking to back date it were, to punish him for raising these matters. Those are inherently aggravating features of an already very unfair dismissal.

12 The second respondent's conduct since the claimant's dismissal in delaying these proceedings, failing to comply with orders, transferring trading, it appears, to a new company to avoid liability, gives credence to the aggravating features of the breach and brings into question his conduct of the affairs of a company. The request to depart today is a continuation of that evasive conduct and speaks for itself.

13 In addition to being satisfied from the claimant's schedule of loss and statement that the first respondent's dismissal of him has given rise to financial losses in excess of the statutory cap (which we therefore award), we also come to decide whether to impose a penalty pursuant to Section 12 A of the Employment Tribunals Act 1996.

14 Section 12A (5) provides that in these circumstances the penalty shall be £5000. 12A (2) provides that we shall have regard to an employer's ability to pay in deciding whether to order a penalty payable. We have no information before us concerning the first respondent's current means in the voluntary liquidation; we might surmise that the first respondent cannot pay the Secretary of State. Nonetheless, we consider it in the interests of justice that a debt be created to the Secretary of State because it might cause inquiry to be made of the circumstances we describe above, where the right not to be unfairly dismissed is of little comfort for the claimant.

REASONS FOR JUDGMENT ON DISABILITY

Introduction

15 The preliminary issue before us is whether, at his dismissal on 8 November 2017, the claimant met the Equality Act definition of a disabled person. He advances a complaint that his dismissal was an act of disability discrimination by the first, second and third respondents.

Issues

16 The issues that the Tribunal has to decide to answer that question were set out by Employment Judge Lancaster following the preliminary hearing on 31 May. Those issues come from the definition itself, in section 6 of the Equality Act 2010 and in Schedule 1 to the Act, Part 1, headed “determination of disability”.

Evidence

17 We had a short impact statement from the claimant and extracts from his GP notes. We heard oral evidence from Mr Benson which supplemented that statement in relevant ways, and it is fair to say that we accepted his evidence entirely. We thought he was cogent and truthful with the Tribunal and we have no reason to doubt anything that he said to us. His evidence of effect, it is fair to say, was limited.

Discussion and conclusions

18 That evidence included, and these are our findings, that certainly by 21 July 2017, he was, as his medical notes a week later record, suffering from poor sleep. He was not eating properly, or cooking properly for himself, and he was struggling with going out of the house at all to undertake social or other activities. On occasions he managed shopping and we know he managed a holiday at the beginning of August.

19 At that time, that is the latter half of July, he was not reporting any thoughts of self-harm to his GP, and he identified to his GP that this episode of mental ill health was different to an episode that he had experienced some 20 years previously with depression. The first GP he saw diagnosed on 21 July that he was suffering with stress at work, that this was a first episode, and that that the condition was to be “grouped with anxiety with depression”.

20 On the basis of the medical notes then, that there was a diagnosed mental impairment of stress at work grouped with anxiety with depression. We consider that is good enough, albeit not expert evidence, to establish mental impairment between July and the dismissal on 8 November (because there was evidence of further consultations about the same condition). We did not consider the notes after 8 November to be relevant to help us apply the Equality Act definition – we cannot assess the position “with hindsight”.

21 The effects that the claimant described on his ability to undertake day to day activities as above were present between July and November 2017, and in our judgment they amounted to a substantial adverse effect in that period. The effect on his ability to cook, to sleep and to socialise was more than minor or trivial; it was substantial.

22 We have considered, because Schedule 1, Part 1, paragraph 2 (3) of the Act may be relevant, whether there is any issue of recurrence to be addressed: it emerged from our questions (but not in the Claimant's statement) that he had had an episode of depression some 20 years ago and that that had resulted in hospitalisation.

23 We did not have any medical evidence at all about that episode, or any evidence of substantial adverse effect. Our findings must be tethered to evidence and although we might speculate about impairment and substantial adverse effect at that time, that is all it would be: speculation as to whether there was impairment which had a substantial adverse effect which ceased, but which could be said to be likely to recur. Was the July to November 2017 adverse effect a recurrence of something earlier? We cannot know the answer to that question in this case.

24 The determinative issues then become very narrow: as at 8 November, when the discriminatory acts are alleged, had the substantial adverse effect lasted for 12 months. Clearly it had not, and that was not the claimant's case. Was it likely to last for at least 12 months, assessing that at 8 November?

25 The evidence we bear in mind in assessing likelihood includes the medical notes. The trajectory of this 2017 episode of mental impairment was not a straight line of deterioration. It started with symptoms that clearly concerned the GP who took a detailed account (but did not note any details about the historic episode). By 16 August 2017, and after a two week holiday, the claimant was saying that "he had spoken with the boss, the issues were largely resolved, and he was planning a return to work". The claimant's mental health then took a turn for the worse and he was described on 2 September as being more anxious. That appears to have been driven by finding out that national insurance contributions had not been made by his employer on his behalf, and that while he was on holiday he had not been paid. Unsurprisingly his mental health deteriorated at that time.

26 Throughout this period until his dismissal on 8 November there were discussions with different GPs about medication (and other treatment) and the claimant resisted medication, no doubt for the reasons that he explained: he had found medication difficult to give up on a previous occasion.

27 With the limited nature of the claimant's evidence and the GP notes, it remains a very difficult question to answer without expert evidence: as at 8 November was it likely that the difficulties in cooking, going out and sleeping, the substantial adverse effect, would last twelve months, that is be present in the latter half of July of 2018.

28 The right test for us of is, "could it well happen?" We certainly consider it was possible in November 2017 that the claimant would still have a substantial adverse effect from impairment in July of 2018, but on the medical evidence that was before us, can we go say "it could well happen". Was it likely, or was it, as the notes indicate, that the effect might fluctuate up and down, and might well resolve entirely in a relatively short period of time, and the claimant's reluctance to access treatment was indicative of his expectation that would be the case.

29 With reluctance frankly, because we know that the insolvency of the first respondent is likely to mean that any remedy against it for unfair dismissal will be a pyrrhic victory, we cannot say that as at 8 November 2017 it could well happen

that the substantial adverse effect on the claimant from mental impairment was likely to last for at least 12 months, on the evidence before us.

30 For these reasons we do not find that the claimant met the Equality Act definition as at 8 November 2017, when he was dismissed.

Employment Judge JM Wade

Date 18 December 2018

Note

Judgments and reasons are published online soon after they are sent to the parties.